ATTACHMENT B

Law Council
OF AUSTRALIA

Access to Aboriginal Land under the Aboriginal Land Rights (Northern Territory) Act 1976

Department of Families, Community Services and Indigenous Affairs

28 February 2007

GPO Box 1989, Canberra, ACT 2601, DX 5719 Canberra
Telephone **+61 2 6246 3788**
Facsimile +61 2 6248 0639
19 Torrens St Braddon ACT 2612
www.lawcouncil.asn.au

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Executive Summary

The Law Council of Australia is pleased for the opportunity to provide these submissions in response to the Department of Families, Community Services and Indigenous Affairs' (FACSIA's) Discussion Paper entitled "Access to Aboriginal Land Under the Northern Territory Aboriginal Land Rights Act – Time For Change" ("the discussion paper").

The Department is commended on its decision to extend the time frame for receipt of submissions to allow proper consultation about the significant proposals contained in the discussion paper.

After careful consideration of the options for changing the permit system set out in the discussion paper, the Law Council has reached the view that none of the options will achieve the outcomes sought by the Department or serve the interests of Aboriginal people. The Law Council makes the following general comments in relation to the discussion paper, which are outlined in detail in this submission:

- The Law Council strongly condemns any proposal to diminish or remove the right of Aboriginal communities to control access to their lands.

- Trespass laws are not an adequate substitute for the permit system.

- Many of the claims set out in the discussion paper are almost wholly unsupported by evidence, which limits the extent to which the claims can be seriously analysed. The bases upon which change is said to be needed are similarly unsupported.

- The Law Council does not accept the proposition that unbridled access for the media will assist in addressing violent crime and drug abuse in Aboriginal communities. The Law Council submits that economic and social isolation of Aboriginal communities is clearly the result of a range of factors, which are not considered by the discussion paper.

- The permit system was not established for the purpose of preventing violent crime and drug abuse. Statistical evidence provided in this paper demonstrates that the 'scourge of drug trafficking, violence and abuse' occurs in all parts of Australia and increasingly in rural and remote areas.

- The majority of the options presented may result in a breach of the *Racial Discrimination Act 1982* (Cth), if implemented.

The Law Council firmly believes that changes to Aboriginal land tenure should be community driven and not imposed on Aboriginal people. There no evidence presented that suggests individual property rights will result in better outcomes for Aboriginal people. If there is such evidence, it should be presented to stakeholders for analysis and comment.

"Liberalisation" of the permit system should similarly be a matter for individual communities to determine according to the specific circumstances they face. The link drawn by the discussion paper between removal of the permit system and economic benefit is tenuous and relies heavily on assumptions, many of which the Law Council regards as highly improbable.

The Law Council urges the Department to reconsider its approach to this issue and adopt a more balanced view of the continuing importance of the permit system to Aboriginal communities in the Northern Territory. In the interests of transparency and openness, the Law Council also calls upon the Department to make all submissions to this review publicly available to ensure a robust and inclusive debate on the issues and, most importantly, to ensure the views of Aboriginal people are heard and understood.

Background

1. The right of Aboriginal people to control access to their land was codified in sections 70 and 73, which were included in the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (the ALRA) at the time of its ascendancy. The ALRA was introduced into Federal Parliament initially by the Whitlam government in October 1975 and subsequently re-introduced by the Fraser government in 1976.

2. The ALRA was substantially based on the recommendations of the Hon Justice Edward Woodward in a landmark Royal Commission into Aboriginal Land Rights. Justice Woodward's findings were lauded on all sides of Parliament, which is apparent from the significant Parliamentary debates that occurred prior to the ALRA's ascent[1].

3. The then Minister for Aboriginal Affairs, the Hon Ian Viner AO QC, stated in the opening remarks of his Second Reading address[2]:

   "The Bill will give traditional Aborigines inalienable freehold title to land on reserves in the Northern Territory and provide machinery for them to obtain title to traditional land outside reserves. The coalition Parties' policy on Aboriginal affairs clearly acknowledges that affinity with the land is fundamental to Aborigines' sense of identity and recognises the right of Aborigines to obtain title to lands located within the reserves in the Northern Territory. The Bill gives effect to that policy and, further, will provide Aborigines in the Northern Territory with the opportunity to claim and receive title to traditional Aboriginal land outside the reserves."

4. The Minister noted, with approval, the comments of Commissioner Woodward in his Final Report presented to Parliament in April 1974, that:

   "…the Aboriginal people themselves must be fully consulted about all steps proposed to be taken."[3]

5. It is of particular relevance to this inquiry that the *Aboriginal Land Rights (Northern Territory) Bill*, originally proposed by the Whitlam Government, was carried forward and ultimately introduced and enacted by the Coalition Government in 1976. The desire to ensure Aboriginal people enjoy freehold title over their traditional lands was felt by all sides of Parliament.

6. The Aboriginal Land Rights Commission identified the capacity of Aboriginal communities to control access to their lands as "one of the most important proofs of genuine Aboriginal ownership"[4]. Accordingly, Commissioner Woodward recommended that the permit system should be implemented to allow aboriginal people to exclude from their lands those who are not welcome, with certain exceptions including police, health and emergency services and public officials.

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[1] Official Hansard, House of Representatives, 1-9 December 1976.

[2] Official Hansard, House of Representatives, 4 June 1976.

[3] Ibid. The comment derives from the *Aboriginal Land Rights Commission*, Second Report, April 1974, paragraph 48.

[4] *Aboriginal Land Rights Commission*, Second Report, April 1974, paragraph 109.

7. In 1998, the Federal Government commissioned John Reeves QC to conduct a review of the ALRA, which recommended that the permit system be abolished in favour of applying the laws of trespass to people who enter Aboriginal lands without permission[5].

8. It is noteworthy that, in presenting to the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs' (HORSCATSIA) Inquiry into the Reeves Review of the ALRA in 1999, Commissioner Woodward stated that for Aboriginal people not to have the capacity to control entry on to their own land would have made a mockery of land rights[6].

9. Ultimately, the Committee rejected the recommendation of the Reeves review that the permit system be abolished, noting that almost all Indigenous groups that were consulted wanted the permit system to remain[7].

10. Given that the unanimous findings of the Committee, chaired by the Hon. Lou Leiberman MP (a Liberal Member for Victoria), were made in August 1999, the Law Council is concerned that less than 8 years later this matter has again been raised for consideration. No new evidence is presented in the paper that would justify reconsideration of the issue, whilst the paper itself is drafted in terms that assume there is a need for change.

11. More concerning is that the discussion paper does not refer to the outcomes of these previous reviews, which should provide the starting point for examination of the issue.

Aboriginal Land Rights (Northern Territory) Amendment Act 2006

12. In September 2006, Federal Parliament passed the *Aboriginal Land Rights (Northern Territory) Amendment Bill 2006* (the amendment Bill), which enabled, *inter alia*, the declaration of 99 year head leases over Aboriginal townships. The purpose of the legislation was to enable Aboriginal people to obtain individual leasehold title over a parcel of communal land, on the basis that the land could then be used as security for finance to construct housing and businesses.

13. The Bill was passed through both houses pursuant to the recommendations of Government Senators on the Community Affairs Committee charged with the inquiry into the Bill. Fifteen written submissions were received by the Committee during the consultation phase, including submissions from the Law Council of Australia, the Minerals Council of Australia, traditional owners, academics and Territory and Federal Government agencies. All submissions called upon the Committee and the Parliament to reject the Bill, save submissions received from FaCSIA and the Northern Territory Government.

14. The disingenuous claim by the Minister that the Bill was the result of almost ten years of consultation with Indigenous communities in fact referred only to the

[5] John Reeves QC, 1998, *Building on Land Rights for the Next Generation: The Review of the Aboriginal Land Rights (Northern Territory) Act 1976*, AGPS, Canberra.

[6] Sir Edward Woodward, Official Hansard, Inquiry into the Reeves Review of the *Aboriginal Land Rights (Northern Territory) Act 1976*, p 561.

[7] *Unlocking the Future – The Report of the Inquiry into the Reeves Review of the Aboriginal Land Rights (Northern Territory) Act 1976*, August 1999, House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, Parliament of Australia, Canberra, paragraph 7.17.

provisions affecting negotiations over mining leases, which were uncontentious and supported by the majority that expended time and resources making submissions to the inquiry. The more insidious aspects, including those dealing with changes to Aboriginal land tenure, were the result of an agreement 9 months earlier between the Northern Territory and Federal Governments, without any subsequent consultation with affected Indigenous communities.

15. It is noted that the Federal Government may consider that the Reeves review and subsequent HORSCATSIA inquiry formed part of the 10 year process surrounding the reforms. Given the finding of the HORSCATSIA inquiry that almost all stakeholders, including mining companies and Aboriginal people "overwhelmingly…wanted the permit system to remain" (with a sole voice of dissent heard from the Amateur Fishermen's Association of the Northern Territory)[8] the Government's claims appear somewhat disingenuous in the absence of other evidence of consultations which tended to support the removal of the permit system.

16. Law Council notes, with some dismay, that the Minister has sought to influence the decisions of some Aboriginal communities to enter into the leasing arrangements by offering to invest Federal money toward desperately needed housing and school facilities[9]. This is despite the claim on the website of the Office of Indigenous Policy Co-ordination (OIPC) that:

> *"Traditional owners will not be required to agree to a lead-lease to obtain basic government services. However, there may be situations where* ***non-essential services or facilities*** *are provided in the context of negotiations for a head-lease."* [emphasis added]

17. The Law Council considers that the broader Australian community would be alarmed to hear that the Federal Government regards housing and education as 'non-essential'. The Law Council strongly believes that, by offering housing and education to Aboriginal communities in return for a head lease agreement, the Minister is not permitting Aboriginal communities to make a free and informed decision about their land and their future.

18. Even more alarming is the stated intention of the Department[10] that the Minister's promises are to be paid for with funds from the Aboriginal Benefits Account (ABA), money accumulated from mining royalty agreements which properly belongs to Aboriginal communities. The use of ABA monies to fund the promises of the Minister is unprecedented and particularly disturbing under the circumstances.

19. It is clear from the Woodward report and the Parliamentary debates surrounding the ALRA that ABA funds were not intended to fund government initiatives or promises. It has also been suggested that the use of ABA funds for this purpose may amount to a breach of the *Racial Discrimination Act 1982*:

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[8] Ibid, paras 7.17-7.32.

[9] The Law Council refers to a number reports in the media and anecdotal information provided by practitioners in the Northern Territory. For example*, '$10 million Tiwi Island school plan comes with a catch'*, Sam de Silva, Tiwi Island News, November 2006; see also *'Island held to ransom over land'*, The Courier Mail, 9 November 2006; *'The long held ambitions for a bad black land law'*, National Indigenous Times Issue 107, 15 June 2006.

[10] Senate Estimates, Community Affairs Committee, Hansard, 30 May 2006.

> "Ultimately, the use of the ABA funds as payment for a government initiative may constitute racial discrimination under s 9 of the *Racial Discrimination Act (1975)*. The government's act to appropriate funds from Indigenous land councils in order to fund its own initiative may be found to be an act of relevant racial distinction where it can be shown that other communities in the same or similar situations do not have their profits or shares from royalty monies appropriated for government initiatives."[11]

20. The Law Council is advised that the source of the funding for the Minister's promises has not been mentioned at any stage in negotiations over head leases, leaving communities to believe that it is additional Federal money being offered. The result will be significantly less funding available for Land Councils, a strange paradox given the Government's concerns about the efficient operation of the permit system.

21. In light of the Federal Government's recent approach to Indigenous policy and given the tenor of the FaCSIA discussion paper, the Law Council is concerned that this consultation may be simply a formality in the process leading to the drafting and implementation of legislation removing or altering the permit system against the wishes of Indigenous communities in the Northern Territory. The Law Council does not believe removal of the permit system is supported by the majority of those affected by it and calls upon the Department to consider these views when preparing its recommendation to the Minister.

[11] Tom Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner and Acting Race Discrimination Commissioner, Submission to the Senate Community Affairs Committee regarding the Inquiry into the *Aboriginal Land Rights (Northern Territory) Amendment Act 2006*, 13 July 2006, p.21.

General Comments

22. The discussion paper states on page 2 that its purpose is 'to examine options for an improved system of access to Aboriginal land under the ALRA and related legislation that both respects the integrity of Aboriginal land and facilitates the normal interactions necessary for social and economic development'.

23. These are laudable aims and the statement identifies that Aboriginal people have a right to respect for the integrity of their freehold land, which they are entitled to hold, to the exclusion of all others. In this respect, land rights under the ALRA mirror the inherent rights of land-owners throughout Australia. Trespass laws reflect this in all States and Territories, permitting land owners to repel unwanted intrusions onto their property.

Trespass and the permit system

24. It is noted in the discussion paper that there are fundamental differences between Aboriginal freehold land and ordinary freehold, which create difficulties in administering trespass laws. The size of Aboriginal land estates and often their remoteness lead to the view that it is not feasible to provide adequate policing to enforce trespass laws.

25. There is no suggestion in the paper that this circumstance has changed, or that the Northern Territory has committed to providing adequate policing in Aboriginal communities. However, the discussion paper does refer to the general agreement reached at the Intergovernmental Summit on Violence and Child Abuse in Aboriginal Communities (the Summit), which is expected to result in improved law enforcement in Aboriginal communities.

26. With respect, the Law Council notes that the Summit's agenda was to address violent crime, abuse and repression of women and children within some Aboriginal communities. Given the Summit did not consider the issues raised in the discussion paper, the Law Council is not comforted that the Summit can be expected to result in sufficient resourcing of Northern Territory Police to address trespass offences in Aboriginal communities, particularly when the focus of operations must surely be to address violence, drug and alcohol related crime and more serious property offences.

27. In any event, prosecutions of trespass offences under the *Trespass Act (NT)* are extremely rare[12]. The majority of trespass offences are met with a civil remedy, which would place the onus on land councils to take action against perpetrators for nominal damages, which would be an impossible burden given current funding levels.

28. The Law Council submits that reliance on trespass laws does not provide any substitute for the current permit system.

[12] Ernst Willheim, *Legal Issues in Implementation of the Reeves Report*, 1999, J.Altman & F.Morphy (ed.), "Land Rights at Risk? Evaluations of the Reeves Report, *Research Monologue no.14*, Centre for Aboriginal Economic Policy Research, Australian National University, Canberra, p.76

Basis for change

29. The discussion paper notes the Minister for Families and Community Services and Indigenous Affairs' view that removing the permit system will result in greater public scrutiny of Aboriginal communities, by freeing access to Aboriginal lands for the media and the general public. It is further argued that 'liberalisation' of the permit system will allow people living in Aboriginal communities to access economic benefits, including capital for investment in business and housing.

30. No evidence is presented in the paper supporting this view. The discussion paper instead refers to a range of problems, which are allegedly the result of the permit system, including:

    a. a lack of public scrutiny and accountability of Aboriginal communities, due to restrictions on media access, which has allegedly led to a "monopoly of silence";

    b. economic and social isolation from the rest of the community which has allegedly "detracted from self-reliance and contributed to Aboriginal disadvantage";

    c. maintaining the isolation of Aboriginal communities in spite of modern communications technology, which has brought the nation closer together; and

    d. that the permit system has not prevented "the scourge of drug trafficking and violence and abuse occurring in many communities".

31. These are serious claims which are not tested by FaCSIA, but are merely presented as statements of fact. The Law Council now takes the opportunity to address these claims.

Public scrutiny and accountability

32. The experience of the last 18 months does not support the claim by the Minister that Aboriginal communities are in some way protected from the media spotlight. News media has played a significant role in scrutinising court decisions involving violent offences by Aboriginal males against women and children, often trivialising or ignoring important aspects of the decisions and inappropriately reporting the sentence, while ignoring the context provided in the sentencing remarks[13]. There have also been sensational and unproven allegations in the media that paedophile rings and drug cartels are operating in Aboriginal communities[14].

33. There is no evidence to suggest that this sort of media attention has improved the situation of Aboriginal communities. However, there is significant anecdotal evidence suggesting that Aboriginal people have suffered greatly as a result of

[13] For example, much of the reporting during the media furore surrounding the 'inappropriate sentence handed down to the offender in *The Queen v GJ* [2005] NTCCA 20 failed to mention that the offender had not been charged with rape (which carries with it a life penalty), but was charged with sexual intercourse with a minor (maximum 16 years). Most reports also incorrectly claimed that the offender had claimed 'customary law' as a defence.

[14] For example, The 7:30 Report, ABC, 17 May 2006; Lateline, ABC, 10 August 2006 – in which it is alleged that a FaCSIA officer assumed the identity of a youth worker to mount unsubstantiated claims of paedophile rings operating in Aboriginal Communities.

negative media attention, which in many cases has vilified Aboriginal culture with the suggestion that it condones violence by men toward women and children.

34. Contrary to the Minister's suggestion, the Law Council is advised that journalists from print, photographic and television media are regularly permitted to enter Aboriginal lands for the purpose of reporting on a range of issues[15].

35. However, it is noted that a key complaint from many media outlets is not whether access is granted, but the speed at which permit applications are approved. The nature of journalistic endeavour is that current issues are fleeting and may cease to be relevant in the period that it takes for a permit to be granted.

36. A notable case relevant to this argument was *Peach v Toohey* [2003] NTSC 57, in which a journalist writing for The Australian newspaper entered the Aboriginal community of Wadeye without first obtaining a permit, in breach of the ALRA. The offender had contacted the Kardu Numida Community Council on several occasions requesting a permit, but was refused on the basis that he intended to obtain a story relating to a funeral being held in the community. Out of respect for the family of the deceased, the Council refused access to all journalists on the day in question.

37. At trial, the magistrate was persuaded that the gravity of the offending was minor and, in the interests of ensuring public scrutiny of events in Aboriginal communities, the offender would escape without conviction, though the offence was proved.

38. On appeal the Magistrate's ruling was quashed and a conviction and fine recorded. In his decision, Angel J observed that the journalist had knowingly breached the law, in circumstances where he new well that he was unwelcome on the day in question. An important observation was made by His Honour at paragraph [12]:

> "…The refusal to grant a permit was confined to the day of the funeral. The respondent had every reason to think he would be granted a permit some time shortly following the day of the funeral when he could conduct his business as a journalist. No reason was advanced why his attendance at Port Keats on the day of the funeral would achieve anything that could not be achieved on a day thereafter. As the appellant submitted, a funeral and its immediate aftermath is ordinarily a private affair to which the media can be invited, or for that matter, from which the media can be excluded. The funeral was but a temporary interruption to the continuing media coverage of events at Port Keats, which, given an inquest, were in no danger of going "unpublished, unrevealed and unventilated." In these circumstances the respondent's "duty as an investigative journalist" referred to by his Worship does not constitute an extenuating circumstance for the purposes of s 8 of the Sentencing Act (NT). The respondent's offence, if not a typical example of a breach of the section, is more serious in that it was wilful and calculated."

39. A further appeal was lodged with the Northern Territory Court of Appeal by Mr Toohey and was allowed, on the basis that the gravity of his offending was not serious enough to obviate the application of section 8(1), enabling the court to exercise its discretion to find an offence proven without recording a conviction or other penalty.

[15] A good example lead to the production of 'Inside the gangs of Wadeye', Sunday, Nine Network, 30 July 2006

40. The freedom of the press is an important principle in democratic societies, but is not an absolute doctrine. The media is not permitted to enter onto private property without permission and may commit offences under the *Trespass Act* if they ignore requests to leave. The Law Council believes that the community would generally support the notion that news media and journalists are able to be prevented from attending funerals and other private occasions, despite that they may be held in public areas.

41. However, as acknowledged in the discussion paper, trespass will not be an adequate substitute for the permit system, particularly as it is unlikely to extend to excessive badgering that might occur in a communal area, such as a cemetery or elsewhere. Nor will it prevent journalists taking photos in breach of a person's wishes. The Law Council's concerns with respect to the capacity of law enforcement to address relatively minor trespass offences are set out above.

42. A positive feature of the permit system is that it enables Aboriginal communities to ensure particular aspects of their culture are observed and protected. By way of example, *DPP Reference No.1 of 1999* [2000] NTCA 6 concerned the case of an Aboriginal elder (the appellant) charged with assault and destruction of property, after he forcibly confiscated the camera of a reporter who had taken photographs of children from his clan. It was contrary to the relevant Aboriginal customary law to take the photographs without the permission of the respondent and the respondent had a special responsibility to protect the children including the preservation of their spiritual well being. It was also expected under Aboriginal customary law for the photographer in these circumstances to pay a penalty or make other amends. The respondent initially demanded that the photographer give the children $50 and when he refused there was a struggle and the respondent grabbed the camera and took out the film.

43. At trial, the appellant claimed the he believed he had an honest claim of right under customary law to take and destroy the film. In relation to the question of property damage, the court held that there was nothing under the ALRA or the *Native Title Act 1993* that gave the appellant the right to enforce customary law on Aboriginal land.

44. It is noted that there are a great many communities throughout the Northern Territory, many of which may or may not understand the principle outlined by the NT Court of Appeal in that case. However, there exists a mechanism to ensure customary law and spiritual beliefs are observed by visitors to Aboriginal land, as permits may be issued on the basis of certain conditions. There is no capacity for Aboriginal communities to require respect for traditional beliefs and customs under the laws of trespass, particularly if free access is granted to journalists or other parties to enter communities and surrounding lands. Nor would there be any capacity to ensure Aboriginal custom is not disrespected if a journalist cannot be removed from Aboriginal land for adopting belligerent or inappropriate tactics in pursuit of a story.

45. One concern raised relates to the ability of journalists to attend on-country court hearings. The Law Council is not aware of cases in which access to on-country court proceedings has been refused and no examples are provided to support this as a concern in the discussion paper. The Law Council is advised that in the vast majority of cases, permits are granted within 24-48 hours of application, which does not appear to support the view that the process is unnecessarily obstructive. The Law Council is also advised that those who unwittingly venture on to Aboriginal land without a permit are generally advised to attend the

community council to obtain one. The Central Land Council advises that it has never received an application from a journalist to attend an on country court hearing. Unless there are regular applications received by other Land Councils, this would appear to limit the extent to which access to on-country court hearings is a problem.

46. In any event, this concern would appear to be obviated by the Northern Territory Supreme Court's decision not to hold hearings on-country where the relevant Land Council has refused access for journalists. In a speech at the opening of the legal year ceremony in Darwin, Chief Justice Brian Martin stated:

> "The question of sitting in communities does, on occasions, carry with it the difficult issue of permits for Aboriginal lands. I have made it clear that it is the view of the Judges that unless the sitting Judge determines otherwise, the fundamental principle of open justice must be observed and nobody but the sitting Judge should have the power to restrict attendance at the open court. The question of permits is a matter of policy for the government of the day and I am not entering into that debate. The Judges have determined, however, that the Judges will not sit in a community if attendance at the sitting is not free and unrestricted by any question of a permit."

Economic and social isolation

47. There can be no doubt that Aboriginal people form the most disadvantaged minority group in Australian society when compared with the broader community on a range of economic and social indicators.

48. In terms of home ownership and wealth, most recent estimates show that Aboriginal people in all states and territories are significantly less likely to own a house[16], while the number of Aboriginal people living in community rental accommodation, particularly in rural and remote areas, has increased significantly in the last 10 years[17].

49. The discussion paper tacitly acknowledges the lack of progress with respect to Aboriginal wealth and home ownership and argues that it is attributable to 'economic and social isolation' which has 'detracted from self-reliance and contributed to Aboriginal disadvantage'.

50. This statement is unsupported in the discussion paper by any empirical or anecdotal evidence. The Law Council notes that the statement appears to accord with the rationale advanced by the Minister for implementing the *Aboriginal Land Rights (Northern Territory) Amendment Act 2006*.

51. The Law Council submits that any decision to remove the permit system on this basis would be unprincipled in the absence of empirical evidence that it has contributed to the lack of economic progress in Aboriginal communities.

52. The proposed legislative changes are directed at encouraging Indigenous communities to abandon a regulatory scheme that supports their cultural beliefs and background in favour of a capitalist land tenure system, which the discussion paper admits cannot be supported by existing trespass laws.

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[16] *Overcoming Indigenous Disadvantage: Key Indicators 2005*, Productivity Commission, Commonwealth of Australia, Part 3.7.

[17] Ibid.

53. The problems surrounding Aboriginal communities cannot be solved by removing the right of Aboriginal communities to determine who may enter their land and on what conditions. It might be more convincingly argued that economic and social outcomes in Aboriginal communities have much more to do with the level of services provided by State and Federal Governments, particularly in geographically isolated or remote areas. Other factors affecting the economic and social circumstances of Indigenous people include poor health and life expectancy, a lack of progress in addressing drug and alcohol abuse, insufficient housing, education services and training, lack of employment, insufficient wealth and assets and an imbalance of government services between metropolitan and rural or remote areas.

54. There is an extraordinary leap in logic required to reach the view that removal of the permit system will address these problems and lead Indigenous communities to economic prosperity. Even if these other factors were ignored, the weight of academic and empirical evidence is against the view expressed by the Department. The World Bank, in reviewing individual titling in developing countries as a pathway to development, reached the view in 2003 that 'subject to minimum conditions, [customary title] is generally more effective than premature attempts at establishing formalised structures'[18]. The World Bank's view was based on its experience observing the implementation of individual titling in African nations, where it noted that individual titling became necessary and effective only when population growth results in land becoming scarce. This could not be said to be the case in central and northern Australia, where the concern is not the availability of land, but the scarcity of arable land or land attracting significant value for investors and developers.

55. A more recent report by the Centre for Aboriginal Economic Policy Research[19] finds that there is no evidence to suggest that individual land ownership is necessary or sufficient to bring about the goals of increasing economic development opportunities and addressing the acute housing needs of rural and remote Indigenous communities. The paper is based on extensive empirical study and considers the well-worn arguments by economist who theorise that individual titling is an essential precondition to sustainable development. It suggests that the notion of land rights reform as the driver for economic development should be reconsidered in the light of entrenched disadvantage, cultural difference and structural factors faced by remote Indigenous communities. The paper also considers the example of similar proposals attempted in New Zealand with poor results:

> "Past experience in Aotearoa/New Zealand demonstrates that individualising land title can actually compromise sustainable economic development on Indigenous land. Innovative policy and partnerships are now addressing the long-term consequences of economic marginalisation, and issues such as home ownership on Maori-owned land. One important lesson is that land fragmentation can create unhelpful barriers between people and increase asset management costs."[20]

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[18] World Bank Land Policies for Growth and Poverty Reduction, Chapter 2, World Bank Research Report, Oxford University Press p.xxvii. See also discussion in Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2005*, Human Rights and Equal Opportunity Commission report no. 4/2005, pp. 119-121.

[19] J.Altman, C.Linkhorn, J.Clarke, August 2005, *Land Rights and Development Reform in Remote Australia,* Centre for Aboriginal Economic Policy Research, Australian National University.

[20] Ibid, p.x.

56. The discussion paper does not consider earlier studies of this nature and provides no evidence to support the contrary view it propounds. The "gatekeepers" preventing willing Indigenous people from engaging in the market economy are not identified in the paper, though the implication is that Aboriginal elders, or those with the power to wield, are the 'culprits'. The Law Council calls upon the Department to provide examples of cases where individuals have been prevented from engaging in the market economy by the permit system, and demonstrate how they will be assisted by its removal.

57. As a further observation, there appears to be a contradiction involved with Federal Government's policy on encouraging self-reliance and economic independence for Aboriginal communities, given it has recently taken over control of the ABA, a key source of funding for Land Councils (which rely on the funds to, among other things, administer the permit system).

58. A further contradiction is found in the failure of Commonwealth entities to pay rent to Aboriginal communities for occupation of land by Commonwealth facilities. Free occupation by Commonwealth entities was initially recommended by Justice Woodward, on the basis that there would be community benefits involved with schooling and medical facilities. This was regarded as compensation for the fact that Indigenous townships were often very remote or isolated and therefore more costly to service[21]. It is noted that the traditional owners of Aboriginal land where townships are based are often in the minority of those living in the community and receiving the benefit of government services[22]. The Law Council considers that the case for Commonwealth entities obtaining free rent from Aboriginal communities has been superseded by the notion that Aboriginal people should be entitled to negotiate leases on Aboriginal land with all parties on a commercial basis. This suggestion must surely be concomitant to the Federal Government's calls for increased self-reliance.

Technological improvements

59. The issue of improvements in communications technology and the failure of the permit system to upgrade from a paper system appears quite trivial when the above matters are considered. However, it is worth noting that the roll-out of telecommunications technology to regional areas of Australia has been reported as a significant problem for several years. Therefore it is unsurprising that Aboriginal communities in remote regions of Australia have not embraced the internet or mobile technology to the same degree as those in metropolitan areas. Again, the discussion paper is devoid of evidence supporting the view that the paper system is 'anachronistic and ineffective', given the resources and circumstances of those organisations required to administer the scheme.

60. In any event, the Law Council considers that the logical response to the problem would be to provide technical assistance, training and funding to enable the permit system to become more efficient. This possibility is not considered in the discussion paper, though it has been readily identified in commentary surrounding

[21] J.C.Altman, C.Linkhorn & J.Clark, *Land Rights and Development Reform in Remote Australia*, Discussion Ppaer No. 276/2005, Centre for Aboriginal Economic Policy Research, Australian National University, Canberra, p.8-9

[22].Ibid.

the Reeves review as a key concern inhibiting the operation of the permit system[23].

Drug trafficking and violence

61. The occurrence of drug trafficking within Aboriginal communities appears to be assumed by the discussion paper, without reference to any police investigation that has uncovered anything as sophisticated as a drug trafficking network. The Law Council is concerned that such claims, when made publicly, are damaging to Aboriginal communities and undermine the efforts of police to address these problems, particularly when specific details are not provided or evidence is unavailable to support the claims.

62. In June 2006, the Minister made the extraordinary claim that $1 million had been found in the Mutitjulu community of the Northern Territory[24], a claim which has not been substantiated by any police investigation. Indeed, the claim was apparently made before any police investigation had commenced.

63. In July 2006 claims were made that, in the same community, elders had been trading petrol for sexual favours with minors. Subsequently, a 'senior Northern Territory police officer' stated that "we haven't found any evidence of petrol being provided for sexual favours"[25].

64. Similarly, claims of 'paedophile rings' in Aboriginal communities have been widespread and apparently affirmed and propagated by the Minister, while evidence supporting the claims has, again, not emerged despite the establishment of a National Indigenous Violence and Child Abuse Intelligence Task Force. It is noted that the claims by the Minister have been publicly rejected by the Northern Territory Police Commissioner[26].

65. The Minister's claims were subsequently supported during an interview on ABC's Lateline with a "youth worker", who claimed first hand knowledge of highly organised paedophile rings in a central Australian Aboriginal community. As the Department will be aware, it was subsequently revealed that the youth worker was in fact a senior Departmental Officer posing as a youth worker, who had apparently fabricated his accounts to support the Minister's unsubstantiated claims[27]. Whatever the motivation or basis for this deception, the Law Council believes that this incident seriously undermined the Minister's position and exposed the extent to which this debate had become mired in ongoing media scandal.

66. These are examples of forms of "media attention" which have been demonstrably unhelpful and the Law Council is concerned that the interjection by the Minister

[23] Nancy Williams, "The Nature of 'Permission'", 1999, J.Altman & F.Morphy (ed.), "Land Rights at Risk? Evaluations of the Reeves Report, *Research Monologue no.14*, Centre for Aboriginal Economic Policy Research, Australian National University, Canberra, p.63

[24] *$1 million found in 'substance abuse' community*, Sydney Morning Herald, 27 June 2006.

[25] *Abuse claims 'overstated'*, AAP, 14 July 2007.

[26] See *Indigenous abuse row fires debate*, The Courier Mail, 18 May 2006. See also Northern Territory Police Media Release: "Paedophile claims not reported

[27] Lateline, ABC, 10 August 2006.

and Departmental officers into what should properly be considered police matters is inappropriate, to say the least.

67. The Law Council believes that there is sufficient hard evidence proving that violence and abuse is occurring at a disproportionate rate in Aboriginal communities, without matters being sensationalised by premature or unsubstantiated claims by public officials or the media. The problems are not new and there is significant evidence that conditions have deteriorated in recent years.

Statistical background

68. The Australian Instituted of Criminology (AIC) has attempted to summarise information about illicit drug use within Aboriginal communities, without great success:

> *National surveys are not well suited to detecting differences between urban and rural Australia, and cannot map drug use across diverse communities. As a result, there is little reliable information on the use of cannabis, amphetamines and other illicit drugs among the 25 percent of Indigenous Australians who live in remote and very remote communities, and even less on policing that use. Only recently have regional analyses and detailed studies in a small number of regional, rural and remote locations begun to throw light on how Indigenous illicit substance use in those communities might differ from drug use in urban contexts (Clough et al. 2004; Lynch et al. 2003; O'Reilly, Moon & Trevana-Vernon 2005).*[28]

69. The AIC's findings show that cannabis and alcohol are the most prevalent, with Aboriginal people in remote communities demonstrating similar usage levels to those dwelling in urban centres. These were regarded by police as the most significant problem. For all other drugs, Indigenous people residing in urban areas were significantly higher users than those in non-urban areas.

70. In addition, the AIC reports that

> *It seems that despite the poverty and isolation of many remote settlements there are huge profits to be made from the illicit trafficking of drugs. More organised cannabis distribution networks appear to have developed because of the extreme profit to be made in the remote areas, where a $4,000 purchase of 400-500 g in Darwin can be expected to return $16,000 to $21,000 in profits, often within several of hours of arriving in the community (Fuller 2004).*[29]

71. The AIC's reports are consistent with the findings of more general studies tracking the extent to which drug networks have extended beyond major cities

[28] Judy Putt and Brendan Dalhunty, *Trends and Issues in Criminal Justice: Illicit Drug use in rural and remote indigenous communities*, report no.322, August 2006, Australian Institute of Criminology, Australian Government, Canberra. Available from http://www.aic.gov.au/publications/tandi2/tandi322t.html

[29] Ibid.

and into smaller townships. Research suggests that the perpetrators are generally from outside the relevant community[30].

72. It is noted that the trend of increasing illicit drug usage in regional areas is common in all jurisdictions and communities (Indigenous and non-Indigenous), though cannabis, alcohol and inhalant use has been significantly more problematic within Indigenous communities. In 10 years, from 1988 and 1998, cannabis and amphetamine use in regional areas increased at the same rate as in metropolitan areas[31]. In addition, recent studies suggest that illicit drug and, particularly, cannabis use in Aboriginal communities has increased sharply in recent years, while drug abuse by Aborigines is more endemic than in non-Aboriginal people across Australia[32]. It is also assumed that drug abuse by Aboriginal people in urban areas is greater than in regional areas.

73. There are cases demonstrating that the permit system actually does enable Aboriginal communities to expel those who exhibit violent or anti-social behaviour[33]. The Law Council is advised that, in the majority of cases where this has occurred, the individual concerned was not a member of the relevant community. Given reports that in a majority of cases drugs are brought into communities by outsiders, it would appear that removing the permit system will deprive Indigenous communities of an important mechanism to protect themselves from perpetrators of such crimes.

74. The evidence of trends in regional areas across Australia demonstrates that the problems in Indigenous communities are not unique, but are common to rural areas across Australia.

75. The permit system was not designed or implemented to prevent drugs getting into communities and it is difficult to imagine how it could possibly be expected to prevent violence from occurring. Drug abuse and violence are prevalent within cities and townships across Australia. They are matters for the police and the courts, which have unregulated access to Aboriginal lands.

76. The justification put forward for the permit system by Commissioner Woodward was that:

> *"One of the most important proofs of genuine aboriginal ownership of land will be the right to exclude from it those who are not welcome."*

77. It was the Parliament's intent, at the time of ascent of the ALRA, that Aboriginal people would enjoy freehold title, with all of the rights and responsibilities that entails, including the right to control entry. At no stage in the Parliamentary debates surrounding the ALRA, or in the subsequent reviews of the ALRA, was it contemplated that the permit system would provide any protection for Aboriginal

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[30] Brenden Dalhunty and Judith Putt, 2006, *The Policing Implications of Cannabis, Amphetamine and Other Illicit Drug Use in Aboriginal and Torres Strait Islander Communities*, Monograph 15, National Drug and Law Enforcement Research Fund, Commonwealth of Australia.

[31] Paul Williams, *Trends and Issues in Crime and Criminal Justice: Illicit Drug Use in Regional Australia 1988-98*, September 2001, Australian Institute of Criminology

[32] Ibid, 21, page

[33] The Law Council has received anecdotal reports of a case in the Tiwi Islands where a man was expelled from the community for anti-social behaviour. A decision was later taken to re-admit the man after he had demonstrated improvement.

communities from drugs or alcohol. Nor was there suggestion that it would prevent or control violence.

78. Accordingly, the Law Council submits that violence and drug abuse in Aboriginal communities do not provide justification for removing the permit system in part or at all.

Application of the Racial Discrimination Act

79. As proposals are directed at removing or weakening a fundamental aspect of Aboriginal freehold title, the Department may wish to consider whether the proposals, if implemented, will offend the *Racial Discrimination Act 1982* (Cth) (the RDA).

80. Section 10(1) of the RDA states:

> *If, by reason of, or of a provision of, a law of the Commonwealth or of a State or Territory, persons of a particular race, colour or national or ethnic origin do not enjoy a right that is enjoyed by persons of another race, colour or national or ethnic origin, or enjoy a right to a more limited extent than persons of another race, colour or national or ethnic origin, then, notwithstanding anything in that law, persons of the first-mentioned race, colour or national or ethnic origin shall, by force of this section, enjoy that right to the same extent as persons of that other race, colour or national or ethnic origin*

81. By virtue of the ALRA, Aboriginal land in the Northern Territory is private property. The owners are simply exercising their legal right to decide who may enter their property. The existence of the permit system is also crucial to the protection of sacred sites, as it allows the custodians of the land to exercise a measure of control over the movements of visitors.

82. The issue of permission and control can be likened to any private property or occupiers interest in knowing the movements of visitors and has been described in the following terms:

> "An important function of permission arises from the responsibility that land owners have for the safety and well-being of all persons on their land. Their concerns include being assured that visitors have adequate water and food and that they do not put themselves at risk by being in or near dangerous places or places to which access is restricted. The corollary is that should a visitor suffer mishap, the land owners will be charged with failure to exercise proper care. This aspect of permission is the basis of land owners' concern about the presence of tourists on their land, a concern that non-Aboriginal people in general and those in the tourism industry in particular either fail to perceive or refuse to believe is 'real'."[34]

83. The Department appears to have overlooked that Aboriginal land is freehold land. It is an extraordinary proposition that some owners of freehold land will not have the right to say who may, or may not, come on to their property. Indeed, the question may still be live even if the statutory permit system is changed in respect of some areas, as the deed of grant to the Land Trust itself may carry with it the right to control entry on to land at common law. As is suggested by at least one

[34] Nancy Williams, ibid 18, p.63

of the options presented in the discussion paper, proposed legislation would have to go so far as to say an owner of Aboriginal freehold cannot refuse permission to particular persons.

84. The Law Council considers the question of discrimination to be obvious in these circumstances.

The Options

85. The Law Council submits that none of the options presented by the FaCSIA discussion paper result in a satisfactory outcome for Aboriginal communities or the interests the Department is ostensibly seeking to satisfy.

Option 1

86. The first option suggests altering the existing legislative framework to:

    a. increase the use of permanently 'open' areas under section 11 of the ALRA;

    b. use section 19(13) authorisations to streamline access in particular areas; and

    c. implement 'administrative improvements' to ensure a timely and efficient system.

87. Despite presenting this as an option, the Department effectively dismisses the proposal on the basis that it will not address the issues of concern to the Department and will most likely create *ad hoc* or confusing arrangements throughout the Northern Territory.

88. The discussion paper does not outline the nature of the 'administrative improvements'. If administrative improvements include increasing funding and resources to Land Councils to enable them to more quickly process applications, then the proposal is welcome. Assuming the proposal allows Aboriginal people to continue to control access to their land and the terms 'streamline' and 'administrative improvements' do not amount to removing their right to control who may enter and the conditions of access, the proposal is supported. However, given the concerns raised by the Department, there appears to be little point in considering it as a feasible option.

89. The Law Council notes that the reference to "monopoly control and abuse by powerful individuals" is not supported by examples where such circumstances prevail and may well be considered offensive to communities that process permit applications in good faith, with the interests of the community in mind.

Option 2

90. The second option would remove the requirement to obtain a permit in order to enter townships and when using communal roads. Sacred sites in townships would continue to be protected and private residences and buildings protected by the law of trespass. Non-township areas would require a permit obtained under a

'simplified permit system', which is not explained in the discussion paper. It is acknowledged that "there would be some challenges in defining public and non-public/private space".

91. The existence of several clans in certain townships is likely to exacerbate the difficulties with implementing this option and the Law Council anticipates significant disagreement over what areas should be designated public or private. The proposal would also prevent Aboriginal communities expelling or refusing access to people in 'public' spaces, which may impinge on the privacy of individuals in the community and result in undesirable persons gaining unfettered access to township areas, while limiting the capacity of communities to expel them. This may create serious problems given the widely reported lack of policing in remote communities and, in the case of communities where so-called 'gang' elements are present, matters will not be assisted by allowing journalists to camp out in the town centre. The Law Council further notes that the issue of public and private spaces is likely to be further confused by the paradox (unrecognised in the paper) that the concept of public and private is most likely to be a matter of degree on communally-owned land.

92. As a general observation, the option appears to be adapted to the township leasing scheme created under the recent ALRA amendments and would enable outsiders free access to township areas for the purpose of establishing a business and other commerce. It is unclear to the Law Council why the permit system is considered to impose such an untenable restriction on those activities as to require its removal. There are many options for ensuring the township leasing scheme is effective without limiting the right of Aboriginal communities to control access to part or all of their land.

93. One such option may be to allow land councils or communities to issue permits in the form of business licences to entrepreneurs, which could be designed to ensure security of tenure and therefore certainty for those interested in establishing businesses. Such a proposal would also allow communities to control the establishment of different businesses and the conditions of trading, which might allow communities to expel those engaged in business activities deemed problematic. The Law Council notes that there are benefits and costs of the free market, depending on the extent of government services available to protect the interests of consumers. Such services are unlikely to be available in remote communities, particularly where policing is scarce.

94. Indigenous people have also expressed concern at the possible increase in "carpet-bagging" around Aboriginal communities and the prospect of unimpeded access for drug dealers and other undesirable elements.

95. The Law Council believes Aboriginal communities' circumstances require that they retain control over elements that are allowed to establish themselves in their townships. Accordingly, the Law Council does not support the option insofar as it involves removing the capacity of Aboriginal communities to exercise that control.

Option 3

96. The third option suggests expanding the categories of people eligible to enter Aboriginal land without permission. The suggestion is that the media might be granted free access for legitimate business, while others (such as 'serious offenders') might be excluded.

97. The immediate concern with this proposal is the use of nebulous terms such as 'legitimate business' and 'serious offenders'. Aboriginal communities may have quite legitimate concerns about the behaviour of journalists, who may equally regard their activities as legitimate. Resolving these issues will most likely create an additional administrative burden for land councils and, in all likelihood, the courts.

98. The Law Council has not been advised of any circumstances where journalists on legitimate business have encountered difficulty obtaining a permit to enter Aboriginal lands. Where a permit has been refused, it is apparent that reasonable justification had been provided for refusing entry at a particular time. The discussion paper does not raise examples, which tends to undermine the basis for suggesting this as an option.

99. There are many reasons that granting unbridled access for journalists would be problematic for Aboriginal communities. Under the option, there would be no power to prevent journalists entering sacred areas, hunting or fishing grounds and other regions of traditional importance. Journalists would have little to prevent them from engaging in activities that might be deemed offensive to members of the community, such as photographing community members or interrupting traditional ceremonies. In addition, the option does not appear to close the class of people that might be given free access, or consider how they might be excluded (and how that might be policed). Nor is there any suggestion of who might be empowered to make those decisions. Given that the proposal to allow journalists would not be a decision for Aboriginal people, it must be assumed that the power to ultimately exclude people, and on what basis, would be vested in the Minister and perhaps delegated to FaCSIA officers or the local council. Whatever the case, the option would have the effect of significantly disempowering Aboriginal communities.

100. The Law Council considers option 3 to be unworkable and does not support it as a proposal.

Option 4

101. Under this option, all areas would be open, except areas designated restricted. Traditional owners would be required to demonstrate a case as to why the restricted areas required protection.

102. The Law Council believes this proposal would completely undermine the authority and control of traditional owners over their land. The onus of proof would shift to Aboriginal communities, while the Minister (presumably) would retain ultimate authority to decide whether a particular area or region is protected. This may involve a process of balancing the interests of Aboriginal communities with the media, researchers, pharmaceutical companies, mining companies, developers and other interests seeking unimpeded access to Aboriginal lands.

103. It is unclear how the proposal would work in practice, or what evidence would be required to satisfy decision makers about whether a particular region ought to be protected. No criteria are set out in the discussion paper upon which the Minister's decision could be made and it seems that the process would be open to a significant amount of disagreement, resulting in litigation and appeals. Contrary to the discussion paper's assertion, the Law Council believes

implementing this option would prove very costly in terms of administration for both Aboriginal communities and the government.

104. The option would not be cost effective, apparently removes the right of Aboriginal communities to control access to their lands and is not supported by the Law Council.

Option 5

105. Under this option, the permit system would be removed altogether and 'replaced' with trespass laws. For the reasons outlined earlier in this discussion paper, the option is rejected.

Conclusion

106. The Law Council calls upon FaCSIA to consider a broader range of options than those presented in its discussion paper.

107. The most recent review of the permit system resulted in a finding that Aboriginal people "overwhelmingly" supported its maintenance as a means by which Aboriginal people could exercise control over their land. Nothing is presented in the discussion paper to contradict that finding.

108. There is no evidence presented in the discussion paper that the permit system unnecessarily impedes media access to Aboriginal lands, or has contributed to the economic and social isolation of Aboriginal communities. The prevailing view among experts in this area is that the poor economic and social outcomes for Indigenous Australians remain tied to poor service delivery, lack of housing, lack of employment opportunities, lack of education and training, poor health and life expectancy and serious drug and alcohol problems affecting Indigenous populations in both metropolitan and regional areas.

109. The permit system was not intended, and cannot be expected, to shield Aboriginal people from violence and the proliferation of drugs and alcohol, which is occurring throughout Australia at an increasing and alarming rate. Statistical evidence produced by the AIC and presented in this paper demonstrates that this is a problem common to all communities and regions. It is not localised within Aboriginal communities.

110. The Law Council submits that the permit system should remain, with investment by the Federal Government toward improving its efficiency and streamlining the permit application process. Focus should move away from assimilation and the current drive to market land tenure reform. Emphasis should be placed on addressing the persistent, complex and unique problems Aboriginal people face in rural and remote areas – with immediate priority on increased housing and improved police and health services.

111. Greater engagement in the market economy by Aboriginal people will not be achieved by diminishing or removing their capacity to control their land or disempowering their leaders. One-size-fits-all approaches to policies affecting Aboriginal people have been tried in the past without any notable success. Studies of Indigenous communities overseas have revealed similar results, which

should serve as a warning to the government about the likely outcome if changes to land tenure are enforced.

112. The Law Council draws upon significant experience and expertise in making these submissions, including from those in the legal community "at the coal-face" and from people working directly with Indigenous communities in the Northern Territory. The Law Council would be pleased to expand on these submissions, particularly if there are any matters raised that require further clarification.

Attachment A

Profile – Law Council of Australia

The Law Council of Australia is the peak national representative body of the Australian legal profession. The Law Council was established in 1933. It is the federal organisation representing approximately 50,000 Australian lawyers, through their representative bar associations and law societies (the "constituent bodies" of the Law Council).

The constituent bodies of the Law Council are, in alphabetical order:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society of the Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- The Victorian Bar Inc
- Western Australian Bar Association

The Law Council speaks for the Australian legal profession on the legal aspects of national and international issues, on federal law and on the operation of federal courts and tribunals. It works for the improvement of the law and of the administration of justice.

The Law Council is the most inclusive, on both geographical and professional bases, of all Australian legal professional organisations.